No. 503

In the Supreme Court of the United States

OCTOBER TERM, 1955

CECIL REGINALD JAY, PETITIONER

v.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The original *per curiam* opinion of the Court of Appeals (R. 26–27; Pet. 13–14)[1] is reported at 222 F. 2d 820. The *per curiam* opinion on petition for rehearing (R. 30–31; Pet. 14–15) is reported at 224 F. 2d 957. The District Court's findings of fact and conclusions of law (R. 15–18) have not been reported.

[1] The record references are designated "R"; references to Exhibit A, constituting records of the Immigration and Naturalization Service, lodged with this Court are designated "E."

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1955 (R. 28), and a petition for rehearing was denied on August 4, 1955 (R. 30–31; Pet. 14–15). The petition for a writ of certiorari was filed on November 2, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

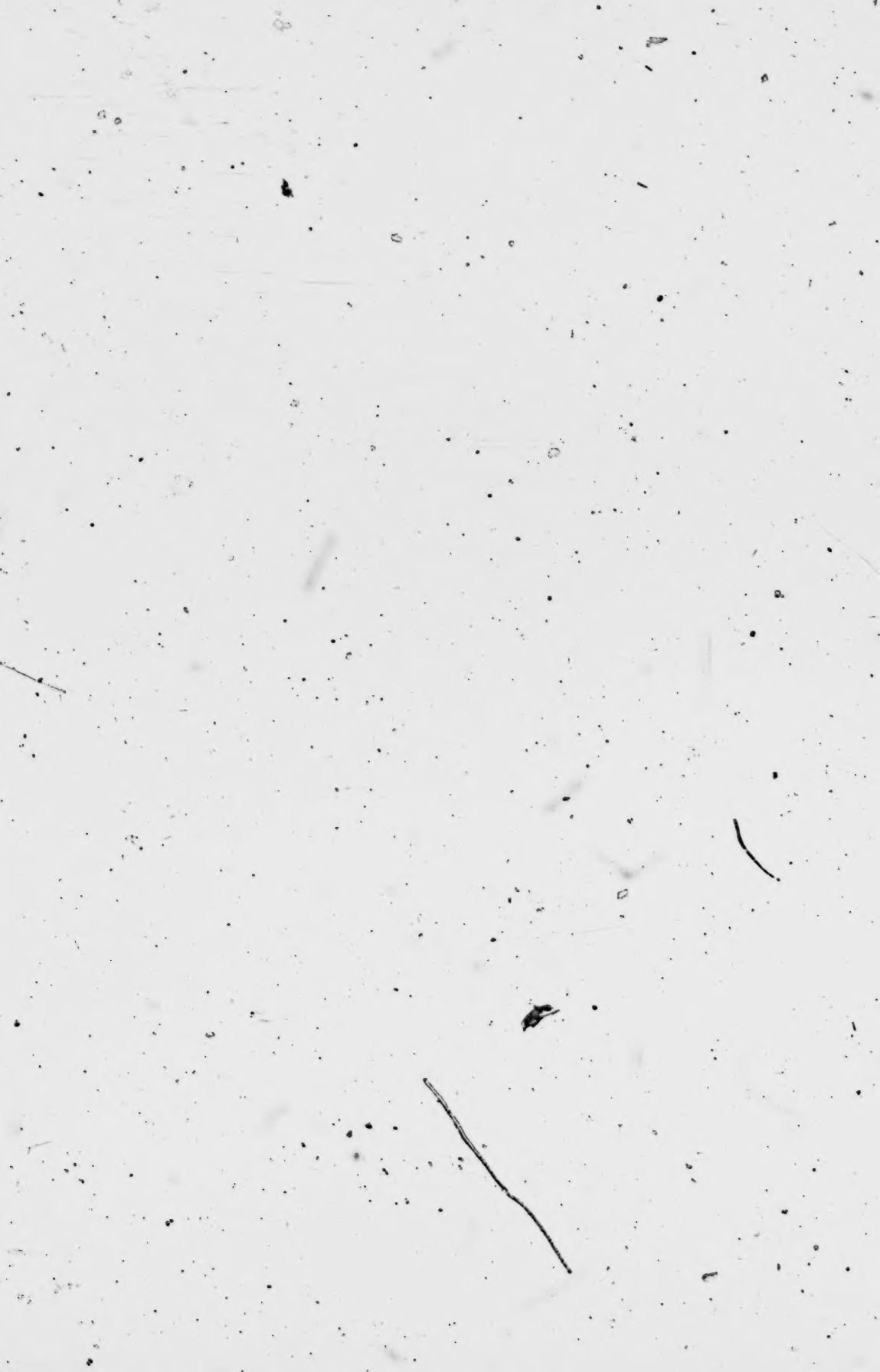
1. Whether the Attorney General's regulation, which permits consideration of confidential information in determining whether to grant to a deportable alien the discretionary relief of suspension of deportation, is valid.

2. Whether the hearing officer's reference to the applicable regulation was sufficient to show compliance therewith.

STATUTE AND REGULATION INVOLVED

Sections 244 (a) (5) and 244 (c) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 214–216; 8 U. S. C. 1254 (a) (5) and 1254 (c), provide:

> Sec. 244. (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—
>
> * * * * *
>
> (5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14),



(15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence.

* * * * *

(e) Upon application by any alien who is found by the Attorney General to meet the

requirements of paragraph (4) or (5) of subsection (a) of this section, the Attorney General may in his discretion suspend deportation of such alien. If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or, prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If within the time above specified the Congress does not pass such a concurrent resolution, or if either the Senate or House of Representatives passes a resolution stating in substance that it does not favor the suspension of the deportation of such alien, the Attorney General shall thereupon deport such alien in the manner provided by law.

8 C. F. R. 244.3, promulgated December 17, 1952, 17 F. R. 11517, provides:

§ 244.3 *Use of confidential information.* In the case of an alien qualified for voluntary departure or suspension of deportation

under section 242 or 244 of the Immigration and Nationality Act the determination as to whether the application for voluntary departure or suspension of deportation shall be granted or denied (whether such determination is made initially or on appeal) may be predicated upon confidential information without the disclosure thereof to the applicant, if in the opinion of the officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.

STATEMENT

Petitioner is a 64-year-old native of England (R. 16). He has resided in the United States since 1921 without acquiring United States citizenship (R. 12, 16). His deportation has been ordered as an alien who, by his own admission, had been a voluntary member of the Communist Party between 1935 and 1940 (R. 12, 16; E. 3, 30). Petitioner thereupon applied for discretionary relief suspending deportation (R. 16). This application was denied on the basis, *inter alia*, of confidential information which had been used pursuant to regulation 8 C. F. R. 244.3 (*supra*, pp. 4–5) (R. 16). Petitioner then brought habeas corpus proceedings in the United States District Court for the Western District of Washington, asserting that the use of confidential information vitiated the refusal to grant him the requested discretionary relief (R. 3–9). The District Court,

following a hearing dismissed the habeas corpus petition, finding that the confidential information had been properly used (R. 17–19). The Court of Appeals affirmed (R. 28).

1. The deportation proceedings.

In July 1949, petitioner was charged with being illegally in the United States, under the Act of October 15, 1918, as amended. Subsequently, under the Internal Security Act amendments of 1950, 64 Stat. 987, 1006, 8 U. S. C. (1946 ed. Supp. V) 137, *et seq.*, a further charge was lodged against petitioner, that he was deportable as an alien who had been a member of the Communist Party after entry into the United States (R. 12, 16). A special inquiry officer found him to be deportable under the lodged charge, and on December 5, 1952, the Board of Immigration Appeals affirmed (*ibid.*). Petitioner does not challenge the fairness of these deportation hearings (R. 16).

On June 30, 1953, petitioner filed a motion with the Board of Immigration Appeals to reopen his case to allow him to apply for suspension of deportation under Section 244 (a) (5) of the Immigration and Nationality Act (*supra*, pp. 2–3) (R. 13). On August 3, 1953, the Board directed that the order of deportation be withdrawn to allow petitioner to file his application (R. 13; E. 31). On November 25, 1953, petitioner filed his application (R. 13, 16; E. 46). Following a

hearing at which petitioner was represented by counsel, the special inquiry officer filed a written decision which stated (R. 16–17; E. 30): "On the record, respondent appears to be qualified for suspension of deportation. However, after considering confidential information relating to the respondent, as is provided for under 8 CFR 244.3, it is concluded that the respondent's case does not warrant favorable action and that his application for suspension of deportation be denied." On appeal to the Board of Immigration Appeals (R. 17; E. 27), the Board affirmed in a written opinion stating that "in light of the confidential information available, it is concluded that the alien is not entitled to discretionary relief" (R. 17; E. 4).

2. The habeas corpus proceedings.

After he had been notified to report for deportation, petitioner attempted to challenge the determination on his application for discretionary relief by petitioning the District Court for a writ of habeas corpus (R. 3–9).[2] In this petition he alleged "upon information and belief" that the confidential information mentioned in the order was the fact that the American Committee for the Protection of the Foreign Born issued a list

[2] The return to the writ of habeas corpus states (R. 12) that a prior application for a writ of habeas corpus was made before the application for suspension of deportation, and that its denial by the District Court was not appealed.

of persons against whom deportation proceedings were pending and solicited support of these persons, that petitioner's name was included on this list, that the Committee had been characterized by the Attorney General as a subversive organization, and that this Attorney General's list had been circulated among the employees of the Immigration Service and the Board of Immigration Appeals (R. 7). The government's return to the writ denied this (R. 14). The District Court made findings of fact and conclusions of law, holding, *inter alia,* that the special inquiry officer and the Board of Immigration Appeals exercised their independent judgment in denying discretionary relief (R. 17), and that the Attorney General may, after complying with all the essentials of due process of law in the deportation hearing and in the hearing to determine eligibility for suspension of deportation, consider confidential information in forming his decision (R. 18). The Court of Appeals unanimously affirmed *per curiam,* holding that petitioner's challenge was "wholly without merit" (R. 26–27, 30–31; Pet. 13–15).

ARGUMENT

Petitioner alleges no unfairness with respect to the hearing at which he was found deportable. His complaint is that in his application for the discretionary relief of suspension of deportation he was treated unfairly in that the denial was based on confidential information.

1. In Section 244 (c) of the Immigration and Nationality Act (*supra*, pp. 3–4), Congress granted the Attorney General the unrestricted power "in his discretion [to] suspend deportation", without in any way limiting or defining the manner in which this power is to be exercised. Congress at once provided the broadest possible latitude for the exercise of this discretion, and the narrowest possible review. With respect to its exercise, the statute itself provides for no hearing on the application for suspension; it leaves the establishment of machinery for the exercise of discretion to the Attorney General. Congress chose to rely upon the informed judgment of a cabinet officer with recognized facilities for investigation and trusted him with a power of dispensation akin to the power of executive clemency.

So far as the statute is concerned, the Attorney General is wholly free, as is the President in the exercise of the pardoning power, to consider any information he deems relevant, from whatever source, in deciding whether an alien who meets the minimum requirements fixed by Congress is entitled to administrative grace. The courts have long recognized that the Attorney General's power with respect to such applications is an exercise of grace, with the decision unreviewable by the courts save where there is a failure to exercise any discretion. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260; *United*

States ex rel. James v. *Shaughnessy*, 202 F. 2d 519 (C. A. 2), certiorari denied, 345 U. S. 969; *Arakas* v. *Zimmerman*, 200 F. 2d 322 (C. A. 3); *United States ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371 (C. A. 2); *United States ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (C. A. 2); *United States ex rel. Weddeke* v. *Watkins*, 166 F. 2d 369 (C. A. 2), certiorari denied, 333 U. S. 876.[3]

The Attorney General has set up by regulation a procedure for hearing on such applications (8 C. F. R. 244.2, 242.54 (d), 242.61) and he has specifically provided that the decision may be

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[3] While providing no review where suspension is denied, Section 244 (c) provides: "If the deportation of any alien is suspended under the provisions of this subsection, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension." Following submission of such report Congress further provided in Section 244 (c) that the deportation should nonetheless be carried out unless before the close of the applicable session of Congress, a concurrent resolution is passed favoring suspension of deportation. The procedure prescribed in Section 244 (b) of the Act for review of decisions for suspension of deportation based on grounds specified in Sections 244 (a) (1) (2) and (3) shows a Congressional purpose to make more rigid the requirements for suspension of deportation in cases where deportation is based on grounds mentioned in Sections 244 (a) (4) and (5). As to the first three sections the decision in favor of suspension will be affirmed unless the Senate or House passes a resolution *against* suspension; as to subsection 5, under which petitioner was eligible for relief, the decision will not be affirmed unless Congress passes a joint resolution in favor of suspension.

based on confidential information (8 C. F. R. 244.3, *supra*, pp. 4–5). This limitation on the Attorney General's self-imposed hearing machinery is valid since the power exercised is one of grace, and not of quasi-judicial adjudication. The courts have specifically ruled that use of confidential information in such cases does not violate due process. *United States ex rel. Matranga* v. *Mackey*, 210 F. 2d 160 (C. A. 2), certiorari denied, 347 U. S. 967; cf. *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392 (C. A. 2); *United States ex rel. von Kleczkowski* v. *Watkins*, 71 F. Supp. 429 (S. D. N. Y.).[4] In analogous situations involving matters of grace, or exercise of executive power, this Court has upheld the right to use confidential information as a basis for decision. *United States* v. *Nugent*, 346 U. S. 1; *Shaughnessy* v. *Mezei*, 345 U. S. 206; *Knauff* v. *Shaughnessy*, 338 U. S. 537.

2. Petitioner also contends (Pet. 8–10) that the hearing officer did not comply with the regulations because he did not state in so many words, in accordance with Regulation 244.3, that "disclosure of such information would be prejudicial to the

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[4] *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. D. C.), and *Maetzu* v. *Brownell*, 132 F. Supp. 751 (D. D. C.), relied upon by petitioner (Pet. 8), arose under the old regulations which had no specific provision for use of confidential information. See also to the same effect *Orahovats* v. *Brownell*, 134 F. Supp. 84 (D. D. C.). Furthermore, the holdings in these cases are contrary to the decision in *Matranga* cited in the text.

public interest, safety, or security". As the court below held on petition for rehearing (R. 30–31; Pet. 14–15), the hearing officer's reference to consideration of "confidential information relating to the respondent, as is provided for under 8 CFR 244.3" (R. 30), shows that he had made the necessary determination that disclosure of the information would not be warranted. No particular words are necessary so long as the decision manifests that the regulation was in fact complied with and that a proper determination was made.

CONCLUSION

The case presents no conflict of decisions and is governed by established principles. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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